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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 981 of 1995

For Approval and Signature:

Hon'ble THE CHIEF JUSTICE G.D.KAMAT

1. Whether Reporters of Local Papers may be allowed to see the judgements? - Yes.

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2. To be referred to the Reporter or not? -No.

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3. Whether Their Lordships wish to see the fair copy of the judgement? -No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?-No.

5. Whether it is to be circulated to the Civil Judge?—No.

SHALIMAR WORKS LTD.

Versus

GUJARAT MARITIME BOARD

Appearance:

MR SURESH M SHAH for Petitioner

MR PR NANAVATI for the Respondents.

CORAM : THE CHIEF JUSTICE G.D.KAMAT

Date of decision: 20/12/96

C.A.V. JUDGEMENT

Rule. By consent, to be heard forthwith.

I have substantially heard parties on merits.

This Revision Application, which is filed by the original defendant, is directed against the order dated 23rd March, 1995 made by a Judge of the City Civil Court, granting conditional leave to defend the Summary Suit instituted by the respondents-Original Plaintiffs upon deposit of Rs.67,80,000/- within a period of eight weeks from the date thereof.

Respondent No.1, Gujarat Maritime Board, is a statutory Board, created under the Gujarat Maritime Board Act, 1981. This Board administers, controls and manages ports other than major ports on the coast line of Gujarat. The petitioner-original defendant is a West Bengal / State Government Company, registered under the Companies Act, 1956. Gujarat Maritime Board placed an order for construction and supply of one Trailing Suction Dredger for Bhavnagar Port with the petitioner Company.

An agreement, bearing A/T No.SEM/PB/NP/96/3, dated 19th of November, 1990, was duly executed between the parties in that behalf on certain terms and conditions enumerated therein. It was agreed that the Maritime Board would pay Rs.7,58,00,000/- plus sales tax. It was also made one of the conditions that 10% of the value of the contracted Dredger will be given to the Company as a first stage payment at the time of placing order, another 10% of the contracted value at the stage of keel laying and the rest in the manner stated therein, with which, presently, we are not concerned. In Clause 15, it was, however, stipulated that if any such stage payment is made by the Board, the Company will execute a bank guarantee in favour of Superintending Engineer (Mech.) of the Board immediately upon receipt of the same.

The Board accordingly made the first stage payment of 10% of the contract value, i.e. to say Rs.75,80,000/-, on 22nd November, 1990, which the petitioner accepted. However, the petitioner-Company did not furnish bank guarantee on receipt of the sum of Rs.75,80,000/-. Large amount of correspondence ensued between the parties and it appears that the State Government of West Bengal intervened, requesting the Maritime Board to accept indemnity bond in lieu of bank guarantee. Despite receipt of the first stage payment of Rs.75,80,000/-, nothing substantial was done in the

matter of erection and construction of Trailing Suction Dredger, with the result the Maritime Board was perforced to issue notice, through their lawyer, dated 12th March, 1993, calling upon the petitioner to refund to the Board, the amount of Rs.37,90,000/-, as, in the meantime, the Board forfeited the security deposit of Rs.37,90,000/-, which had been furnished by the petitioner to secure the contract. Upon finding that nothing was forthcoming, a Summary Suit under Order XXXVII of the Code of Civil Procedure, 1908, being Summary Civil Suit No.4553 of 1993, was instituted in the City Civil Court at Ahmedabad. In the Suit, a decree was sought for an amount of Rs.1,10,40,270/-, with interest at the rate of 18% per annum from the date of the suit till realization. The genesis of the claim in the suit is for recovery of 10% of amount paid, minus the forfeited deposit, which comes to Rs.37,90,000/-; Rs.18,76,050/-, being the amount of interest on the earlier mentioned sum, from 22nd November, 1990, i.e. the date of payment, till the date of the suit; Rs.15,84,220/-, being the amount of interest at the rate of 18% per annum on Rs.37,90,000/- from 22nd November, 1990 till the date of encashment of the bank guarantee, i.e. till 20th March, 1993; and Rs.37,90,000/-, being the amount of liquidated damages under Clause 6(a) of the Agreement dated 22nd November, 1990.

An affidavit is filed, opposing the claim in the suit and several objections are raised on the maintainability of the suit under Order XXXVII of the CPC. The learned Judge, however, after hearing the parties, granted leave to defend in favour of the petitioner upon condition that the petitioner pays an amount of Rs.67,80,000/- within a period of eight weeks thereof. The petitioner is required to pay a sum of Rs.67,80,000/made up as follows :-

- (i) Rs.37,90,000/-, being the amount of balance due from the first stage payment of Rs.75,80,000/- after deducting the forfeited amount of security deposit; and
- (ii) Rs.30,90,000/- as and by way of liquidated damages under Clause 6(a) of the agreement,

together making a sum of Rs.67,80,000/-.

It appears that, prior to the order was made, a Pursis was filed on 16th of March, 1995 on behalf of the Board-original plaintiff that for the stage of hearing of the summons for judgment, no claim for interest made in

the suit is being pressed and the claim in the suit for summons for judgment is confined only to an amount of Rs.75,80,000/-, which had been given as a first stage payment.

This order of granting conditional leave to defend upon payment is now attacked in the present Revision Application on behalf of the Company.

The first of the contentions raised by Shri S.M. Shah is that the claim made in the suit and the averments made therein do not fall within the scope and ambit under Order XXXVII of the Code of Civil Procedure for the purpose of instituting a summary suit. It is contended that the claim is based upon the so-called breach of the contract for return of the first stage payment made as also for liquidated damages. It is sought to be contended that all these claims are required to be decided finally in the suit at the trial and without trial, there cannot be any determination of any of the claims made in the suit and the same ought to have been dismissed.

It is next contended that, in any event, having regard to the nature of suit required to be treated as a suit under Order XXXVII, there cannot be any bifurcation of claims for the purposes of summons for judgment and some claims being left out for determination at the trial. This is obviously stated having regard to the fact that before the passing of the order dated 23rd March, 1995, on 16th of March, 1995, the respondent-Board, original plaintiff, had restricted their claim for the purpose of summons for judgment to a principal amount of Rs.75,80,000/- and thereby, leaving the claim for interest and liquidated damages to be determined at a later stage. It was urged that this course was impermissible and, therefore, in any case, there was no question of any conditional leave being granted and, on the contrary, leave ought to have been given as a matter of course.

Lastly, it is contended that Gujarat Maritime Board is a Board created by the State Government and the petitioner-Company is a West Bengal Venture. Being so, the respondent-Company cannot be allowed to sue for recovery of money, based on cause of action of not furnishing a bank guarantee. It is clearly incumbent to follow the Government policy in matters of disputes of Public Enterprises, urges Mr.Shah. In other words, what is suggested is that in the matter of disputes between State Level Enterprises, bank guarantees cannot be

insisted upon.

I will take up the last point first. It is the contention that at State-level Enterprises, there ought not to be insistence on bank guarantees. In this connection, some literature has been placed on record, titled "Government Policy for the Management of Public Enterprises", published by the Bureau of Public Enterprises, Ministry of Industry, with the assistance of Standing Conference of public Enterprises. I would have appreciated this argument, but I refrain from doing so, because, the parties before this Court has a written agreement, which provides for dispute being referred to arbitration. Despite the present suit being instituted by the Gujarat Maritime Board, the petitioner-Company did not apply for stay of the suit nor sought arbitration of the dispute at any stage, prior and after the institution of the suit. On the contrary, when a query was made, the counsel, appearing for the Company, gave an impression that the Company does not want to take recourse to arbitration. Secondly, the contract between the parties have provided for furnishing bank guarantee. In this view of the matter, I am unable to understand the point sought to be raised by the learned counsel on behalf of the petitioner-Company and the same, therefore, carries no merit whatsoever.

Coming to the maintainability of the suit as a Summary Suit, falling under Order XXXVII, the first contention is that a cause of action in the suit has been based upon non-furnishing of the bank guarantee by the petitioner-Company after receipt of the first stage payment of Rs.75,80,000/-, corresponding to 10% of the value of the contract. Correspondence is relied upon to suggest that despite no bank guarantee being furnished, the petitioner-Company was ready to furnish indemnity bond, that too, at the behest of the State Government of West Bengal, and secondly, despite no bank guarantee being furnished yet, the Gujarat Maritime Board, in its correspondence, called upon the petitioner-Company to go ahead with the erection and construction of the Dredger in question. More particularly, a reference was made to Minutes of the Meeting held at the premises of the Company on 27th December, 1991, where it was agreed that priority be given to keel laying stage. An argument is, thus, sought to be advanced that though no bank guarantee was furnished, but much after the contract was in force, as late as December, 1991, parties had even agreed for completing the work.

It was, therefore, sought to be further argued

that there was some sort of an agreement between the parties, whereby the Gujarat Maritime Board had given up the issue of bank guarantee in its favour.

Relying upon the provision of Rule 2(b)(i) of Order XXXVII, it is contended that the present suit is not maintainable as a Summary Suit. Upon reading Rule 1 of Order XXXVII, counsel placed reliance on Rule 2, and, according to him, what is attracted is clause (b)(i).

Rule 2 in terms states that subject to the provision of sub-rule (1), the Order applies to the classes of suits enumerated therein, and clause (b) covers a suit, in which the plaintiff seeks only to recover the debt or liquidated damages in money payable by the defendant, with or without interest arising on a written contract.

Now, it is pointed out that in the suit, there is no 'debt' to recover and that too, arising out of a written contract, and, secondly, the claim for liquidated damages can only come when issues are finally decided after taking evidence. It is in these circumstances Shri Shah asserts that when there is no debt to be recovered under a written contract nor the claim for liquidated damages can be ascertained at the stage of summons for judgment, there was no question of summary suit being entertained and, in any case, there is no question of grant of any conditional leave and the leave, if any, ought to have been given as a matter of course. (In support of this contention, reliance has been placed on the decisions in Santosh Kumar v. Bhai Mool Singh, AIR 1958 SC 321, Jashbhai Motibhai Patel v. Hasmukhbhai Ravjibhai Patel, 31(2) GLR 1296, Kachrabhai Ishwarbhai Patel v. Gopalbhai C. Patel, 13 GLR 975, and M/s. Mechalee Engineers and Manufacturers v. M/s. Basic Equipment Corporation, AIR 1977 SC 577.

In my view, it is not necessary to go into details or dilate on the authorities cited across the Bar and it is sufficient to notice the principle to be followed while granting leave, conditional or unconditional, to defend a suit, which are laid down in AIR 1977 SC 577. In this Authority, the Supreme Court culled out the following five principles :-

- "(a) If the defendant satisfies the Court that
 - he has a good defence to the claim on its
 - merits the plaintiff is not entitled to

leave the sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

Shri Shah contended that the case of the

petitioner-original defendant falls in predicates (a), (b) and (c) extracted above and, therefore, unconditional leave ought to have been granted so that the parties go to trial in regular course.

The Apex Court itself has laid down that the Supreme Court judgments cannot be read as statutes and this is indeed so, because, facts in each case differ. What is necessary is to apply the ratio laid down to the facts of a given case. It is indeed true that principles laid down by the Apex Court are binding but those principles are naturally to be applied to the facts of a given case.

I have taken pains to go through the affidavit filed on behalf of the petitioner, and I am totally satisfied that there is no defence whatsoever as far as the Company is concerned. Upon putting an end to the contract unilaterally and committing a breach of the contract, the defence is so fragile or illusory that there is no defence at all.

I have already indicated elsewhere that there is a written contract between the parties with regard to the erection of a Dredger, which clearly provided for stage payment. It is indeed true that in terms of the contract, the Company furnished security deposit of the amount of Rs.37,90,000/-. In its turn, upon execution of the contract on 22nd November, 1990, the Gujarat Maritime Board made 10% payment as a first stage payment, amounting to Rs.75,80,000/-, and upon receipt of the same, the petitioner-Company had to furnish bank guarantee, which it did not. Though it is true that there has been correspondence between the parties, at no stage any novatio to the contract can be spelt out, by which the Board dispensed with furnishing of the bank guarantee or ever accepted in lieu thereof the indemnity bond. For that matter, even until last, the so-called indemnity bond, agreed to be furnished by the West Bengal Government, did not see the light of the day. It is a clear position under the law that there can be no oral agreement, varying the terms of a written contract. In this view of the matter, prima facie, it is impossible to accept that there had been any variation in the contract merely because, at some stage, the Competent Officer of the Maritime Board agreed to the proposal of the petitioner-Company to take up the stage of keel laying. The second aspect, which, in my view, comes in the way of the petitioner-Company, is that by its letter dated 5th / 9th November, 1992, the Government of West Bengal, on behalf of the Company, held out thus :-

" xxx xxx xxx

Please refer to your letter No.WKS-7390-30889-GH
dated 4.8.1992.

The issues raised by you have been examined and
it appears that the lack of progress of the work
by The Shalimar Works during 1991 was beyond the
control of the Company.

During the last stages of negotiations and early
stages of the contract for your Dredger, the
economic and business scenario changed rapidly
imposing unprecedented constraints in way of
credit squeeze by the Banks, steep rise of
exchange rate and restriction on import of items
imposed by the Government of India and provisions
of 200% margin in the wake of the Gulf War.

The Shalimar Works had been reiterating its
inability to provide Bank Guarantees other than
the guarantee for Security Deposit of Rs.37.90
lakhs already executed and have been repeatedly
requesting you to accept Company's Indemnity Bond
in lieu. Subsequent to signing the agreement on
10.11.90, a meeting was held at Bhavnagar, where
it was agreed that Indemnity Bond against stage
payments would suffice in lieu of Bank Guarantee,
but this was not acted upon.

Meanwhile, there was unprecedented rise in price
of all material, wages, power, fuel, Bank rates
etc. Such increase not only affected the Indian
market, but also the foreign market whereby the
price of imported dredging equipment went up, and
this had further adverse affect on this contract
due to unfavourable variation in exchange rate on
account of devaluation of the Rupee.

You would appreciate that the contract is no
longer workable particularly in the face of
withdrawal of escalation clause for material,
labour etc.

However, in order to arrive at a mutually
acceptable solution to the problem through
discussions, I have advised Commodore S.C. Bose,
CMD, The Shalimar Works (1980) Ltd. to contact

you.

xxx xxx xxx "

From what is extracted above, it is clear that after having examined all the issues raised by the Gujarat Maritime Board, the petitioner-Company held out that lack of progress of the work was beyond the control of the Company and that the economic and business scenario had changed rapidly, imposing unprecedented constraint in the way of credit squeeze by the banks, steep rise of exchange rate and restrictions on import of items imposed by the Government of India and provision of 200% margin in the wake of Gulf War. After reiterating that the company is unable to furnish bank guarantee, the Company further held out that the contract is no longer workable, particularly in the face of withdrawal of escalation clause for material, labour, etc. It is, therefore, abundantly clear that the contract was put to an end unilaterally by the Company and the West Bengal Government. It is in these circumstances that the petitioner-Company cannot be allowed to retain what they received as a first stage payment. In fitness of things, therefore, taking any view of the matter, it is clearly incumbent upon the petitioner-Company to return the first stage payment, corresponding to 10%, i.e. Rs.75,80,000/-, to the Government and Maritime Board without any demur. Now, the position is that the Gujarat Government, having already encashed the security deposit of the value of Rs.37,90,000/-, they are entitled to receive the balance of Rs.37,90,000/- out of the first stage payment made by them to the Company and there can be no doubt whatsoever on return of this money. In any case, therefore, the conditional leave can be granted only upon such a payment. In my opinion, once one of the contracting parties has put an end to the contract, might be for whatsoever reasons, it is impossible to allow them to retain the moneys, which were received under the contract and it is futile to accept an argument that the petitioner-Company has a counter claim to make. By directing the petitioner-Company to return the first stage payment, the Court brings about the status quo ante as the contract is made not workable by the petitioner-Company itself. Therefore, it is not possible to hold that this is not a debt under the contract. In fact, the 10% payment of the value of the contract made to the petitioner-Company was under the contract and, therefore, it is a 'debt', within the meaning of Order XXXVII Rule 2(b)(i) of the Code of Civil Procedure, 1908.

The next question to consider is whether the learned City Civil Judge was right in insisting upon the petitioner-Company to deposit the sum of Rs.30,90,000/-, being the amount of liquidated damages under Clause 6(a) of the Agreement dated 22nd November, 1990. In my view, the claim for liquidated damages could not have been considered at the stage of making summons for judgment. Taking any view of the matter, this claim has to be tried in the suit. To that extent, I find that there is a material irregularity committed by the learned City Civil Judge, Ahmedabad and to that extent, the impugned order needs to be modified. Learned Counsel Shri Premal Nanavaty also fairly conceded that summons for judgment need not have been insisted upon for claiming liquidated damages at this stage.

Respondent-Gujarat Maritime Board, having already recovered the sum of Rs.37,90,000/-, by forfeiting the security deposit, they are liable to secure the balance amount of Rs.37,90,000/- out of the 10% first stage payment, which was made by them to the petitioner-Company. Accordingly, the amount of Rs.37,90,000/- ought to be directed to be paid by the petitioner-Company to the Gujarat Maritime Board as a condition precedent for leave to defend the suit.

The Revision accordingly partly succeeds. Conditional leave to defend the suit is granted to the petitioner-Company, original defendant, upon payment of Rs.37,90,000/- within a period of six weeks from today. Rule accordingly made absolute, with no order as to costs.

(apj)